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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MITCHELL SILBERBERG & KNUPP LLP, Plaintiff and Respondent, v. DAVID BERGSTEIN, Defendant and Appellant.	B287729 (Los Angeles County Super. Ct. No. BS160838)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Timothy D. McGonigle for Defendant and Appellant.

Mitchell Silberberg & Knupp and Richard B. Sheldon for Plaintiff and Respondent.

INTRODUCTION

This appeal arises out of an arbitration between David Bergstein and the law firm of Mitchell Silberberg & Knupp LLP. During the pendency of the arbitration, Bergstein was indicted on federal charges of investment advisor fraud, wire fraud, and securities fraud. Asserting his Fifth Amendment right against self-incrimination, Bergstein sought a stay of the arbitration pending disposition of the federal criminal case. The arbitrator denied Bergstein's request for a blanket stay, but determined he could invoke the privilege in response to specific questions asked of him or in response to specific requests for evidence. Instead, Bergstein chose not to personally attend any of the arbitration. After an evidentiary hearing, the arbitrator found for the law firm and awarded it upwards of $1 million dollars in damages.

Mitchell Silberberg & Knupp LLP petitioned the Los Angeles Superior Court to confirm the award and Bergstein petitioned the court to vacate the award, largely on the argument that his right against self-incrimination was violated when the arbitrator refused to grant him a stay. He also argued that the arbitration award violated public policy because of ethical breaches committed by the law firm. The trial court affirmed the award, denied Bergstein's petition to vacate, and Bergstein now appeals.

Because Bergstein was not entitled to a blanket, indefinite stay of the arbitration proceedings and there was no evidence of ethical breaches, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 14, 2016, plaintiff and respondent Mitchell Silberberg & Knupp LLP (MSK) filed a petition in the Los Angeles Superior Court for order compelling arbitration and

appointing a neutral arbitrator. MSK sought to recover over $1 million dollars in legal fees from defendant and appellant David Bergstein (Bergstein). Specifically, MSK brought claims for breach of written contract, services rendered, open book account, and account stated. On June 14, 2016, the court granted MSK's unopposed petition to compel arbitration and, on July 22, 2016, the court granted the parties' stipulation to appoint a neutral arbitrator.

Shortly thereafter, on September 19, 2016, the United States Attorney for the Southern District of New York served a grand jury subpoena on MSK requesting information about eight payments deposited to its Wells Fargo account in 2011 and 2012. The subpoena did not specifically identify whose payment information was sought; however, MSK notified Bergstein that the United States Attorney was seeking records pertaining to payments Bergstein had made "relating to a litigation matter for which MSK previously performed legal services for you and/or others."

On December 7, 2016, Bergstein was criminally indicted on federal charges in the Southern District of New York for, *inter alia*, investment advisor fraud, wire fraud, and securities fraud. The indictment arose from Bergstein's dealings with Weston Capital Asset Management (Weston), a registered investment advisor, and the various hedge funds Weston managed. Included in the indictment are allegations that Bergstein used the misappropriated funds in part to pay unrelated business expenses and a variety of his own personal expenses, including "credit card bills and unrelated attorney's fees," and his wife's credit card bills. MSK is not mentioned anywhere in the indictment and it is undisputed that MSK never represented

Bergstein in connection with Weston or any investment fund referred to in the criminal indictment, or in connection with any of the conduct at issue in the criminal indictment.

The arbitration hearing was set for March 20, 21, 22, and 24, 2017. On February 23, 2017, Bergstein filed a motion with the arbitrator seeking a temporary stay of the arbitration pending resolution of the federal criminal action against him. Bergstein argued that the federal criminal action " 'relate[d] in part to facts and actions relevant to' " claims in the pending arbitration, and proceeding with the arbitration would compromise his privilege against self-incrimination. Specifically, Bergstein claimed he would be " 'unfairly penalized and unduly burdened for exercising his constitutional rights' " were the arbitration to proceed before the federal action was resolved.

In opposition to the motion to stay the arbitration, MSK offered to stipulate that it would not ask Bergstein questions about the source of Bergstein's payments to MSK. Bergstein did not accept the offer. MSK also represented it had no intention of asking Bergstein questions about Weston or whether Bergstein defrauded Weston's investors by improperly diverting money to pay his personal expenses, including fees he owed to MSK.

On March 6, 2017, the arbitrator heard oral argument on the motion. The arbitrator denied the motion for a stay of the arbitration, but ruled Bergstein had the right to assert the Fifth Amendment privilege in response to specific questions at the arbitration hearing. On the Friday before the March 20, 2017 arbitration hearing, Bergstein's counsel advised MSK that if Bergstein were called as a witness, he would state his name and address but assert his Fifth Amendment rights and not answer any other questions. Ultimately, Bergstein did not personally

appear at all for the entirety of the arbitration. His counsel appeared instead.

The arbitration went forward on March 20, 21, 22, and 24, 2017. Bergstein's counsel again moved for a stay of the arbitration and the arbitrator again denied the motion. Both parties called witnesses and presented evidence. Bergstein challenged MSK's claim for attorney fees on three grounds: (1) the arbitrator was without jurisdiction to entertain the issues related to MSK's claims; (2) there was no admissible evidence as to the amount of fees claimed due and owing, and whether the amount of fees claimed was reasonable; and (3) if the fees were reasonable, no fees should be awarded because of alleged ethical breaches or breaches of fiduciary obligations by MSK to Bergstein.

The arbitrator found for MSK on all claims in its Demand for Arbitration and denied each of Bergstein's defenses.[1] On October 13, 2017, MSK petitioned the Los Angeles Superior Court to confirm the award. Bergstein filed a counter-petition to vacate the award. In relevant part, Bergstein alleged the arbitrator's refusal to stay the arbitration prohibited him from testifying, and the arbitral award violated public policy. The court granted MSK's petition to confirm the award and denied Bergstein's petition to vacate it. On December 4, 2017, judgment on the award was entered in favor of MSK in the amount of $1,541,886.62.

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[1] We have not reviewed Bergstein's affirmative defenses as set out in his response to the Demand for Arbitration because his response is not part of the record on appeal. We know of his defenses second-hand because the arbitrator summarized them in her final written ruling.

Bergstein timely appealed.

DISCUSSION

Bergstein raises two claims on appeal: (1) the court erred in affirming the arbitral award because the arbitrator erroneously denied his request for a stay; and (2) the arbitral award violated public policy.

A. Appealability

As a general rule, the merits of an arbitrator's decision are not subject to judicial review. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.) Judicial review of arbitration awards is limited exclusively to the statutory grounds for vacating or correcting the award. (*Id.* at pp. 27-28.) Code of Civil Procedure section 1286.2, subdivision (a), which sets forth grounds for vacating an arbitration award, is an exception to the general rule precluding judicial review. Subdivision (a)(5) requires a court to vacate an arbitration award when a postponement request supported by sufficient cause is refused and the moving party suffers substantial prejudice. This section is a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.)

In addition, Code of Civil Procedure section 1286.6 permits correction of an arbitral award where the award was issued in excess of the arbitrator's powers. Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy. (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916.) Thus, the normal rule of limited judicial review may be avoided in rare cases when according finality to

the arbitrator's decision would be incompatible with the protection of a statutory right. (*Moncharsh v. Heily & Blase, supra*, 3 Cal.4th at p. 33.)

B. Standard of Review

On appeal from the trial court's order granting or denying a request to vacate an arbitration award, our review is de novo. (*SWAB Financial, LLC v. E*Trade Securities, LLC*, *supra*, 150 Cal.App.4th at p. 1198.) The decision whether to grant a continuance lies in the first instance within the discretion of the arbitrator. (*Ibid.*; Code Civ. Proc. 1282.2.) Therefore only if the arbitrator abused her discretion and there was resulting prejudice could the trial court have properly vacated the arbitral award. (*SWAB Financial, LLC v. E*Trade Securities, LLC*, *supra*, at p. 1198.)

C. Fifth Amendment

A witness may invoke the privilege against self-incrimination in " 'any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.' " (*Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 686, 688.) A "blanket" refusal to testify in a civil proceeding, however, is "unacceptable." (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.) A person invoking the Fifth Amendment privilege in a civil proceeding "must do so with specific reference to particular questions asked or other evidence sought." (*Ibid.*) Once this is done, the court must then "undertake a particularized inquiry with respect to each specific claim of privilege to determine whether the claimant has sustained his burden of establishing that the testimony or other evidence sought might tend to incriminate him." (*Ibid.*)

In conducting this inquiry, the court (or arbitrator) considers the witness's claim of privilege along with the interests of the plaintiff, who is entitled to "an expeditious and fair resolution of their civil claims," and the court's interest in "fairly and expeditiously disposing of civil cases, and in efficiently utilizing judicial resources." (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 306.) "[C]ourts are guided by the strong principle that any elapsed time other than that reasonably required for pleadings and discovery 'is unacceptable and should be eliminated.' [Citation.] Courts must control the pace of litigation, reduce delay, and maintain a current docket so as to enable the just, expeditious, and efficient resolution of cases." (*Id.* at pp. 306-307.)

Courts faced with a civil defendant who is exposed to a related criminal prosecution have responded with various procedural solutions designed to fairly balance the interests of the parties and the judicial system. Accommodation of the various interests, however, is usually made to a defendant in a civil action from the standpoint of fairness, not from any constitutional right. (*Fuller v. Superior Court*, *supra*, 87 Cal.App.4th at p. 307.) One accommodation is to stay the civil proceeding until disposition of the related criminal prosecution. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882.) However, a party is generally entitled to a stay when both the civil and criminal proceedings arise out of the same or related transactions. (*Pacers, Inc. v. Superior Court*, *supra*, 162 Cal.App.3d at p. 690.)

Here, the arbitrator thoroughly and carefully considered Bergstein's request and determined that no basis existed for a blanket stay. In her decision, the arbitrator noted "[w]ithout

knowing precisely when the criminal matter might actually go to trial, it is difficult to assess whether or not there would be prejudice" to MSK. She noted the amounts allegedly owed went as far back as 2011 and the arbitration, which she described as "a contractual process to expeditiously resolve civil disputes," had been calendared since September 2016. The arbitrator considered these concerns and balanced them with what she noted as Bergstein's "legitimate concerns."

Bergstein contends the "key language" of the arbitrator's reasoning in denying the stay is one sentence in which she stated "[a]s simply set forth by [MSK], the issues for determination are the fees MSK claims were not paid; not issues regarding fees that were paid." Bergstein argues it is "flagrantly incorrect" and "indefensible" to conclude that payments made by Bergstein were irrelevant to determining the sums MSK claims were not paid; he argues that evidence of payments he made which MSK did not account for were relevant to the criminal proceedings against him.

The trial court noted, and we agree, that Bergstein selectively quotes this language "in a way that mischaracterizes the overall analysis." This sentence appears at the end of a lengthy and reasoned analysis in which the arbitrator determined she could not determine what Fifth Amendment assertions may be made and potentially sustained until the matter went forward. She noted Bergstein had not claimed MSK provided any services for him that were the subject of both the arbitration and the federal criminal matter, and Bergstein had not shown with any specificity how the claims in the arbitration had any bearing on the claims in the indictment. The arbitrator also determined Bergstein failed to demonstrate that the source

of the funds he used to pay certain fees to MSK was in any way related to his claim that MSK breached its fiduciary duty. The arbitrator concluded her analysis as follows: "In sum, the claims subject to determination in this arbitration are not related to the charges in the indictment or, at best, are tenuous. Balancing the interests of all concerned parties, there is no factual or legal basis to stay the arbitration." We cannot agree with Bergstein that the arbitrator based her entire decision to deny his request for a stay on the observation that the issues for determination were the fees MSK claimed were unpaid, rather than the fees that Bergstein did pay.

Nonetheless, there was no reason at the arbitration for MSK or Bergstein to address payments already credited to Bergstein's account. Indeed, MSK agreed not to do so. Furthermore, MSK offered to refrain entirely from questioning Bergstein about the source of funds used to pay certain attorney fees, and represented it would not ask any questions related to Weston or Bergstein's dealings with Weston. Bergstein fails to demonstrate why this was not a reasonable accommodation.

The remaining possibly incriminating inquiry was whether Bergstein had made additional payments that had not been properly credited to his account. The arbitrator expressly stated Bergstein maintained the right to assert his privilege against self-incrimination during the hearing. Of course, Bernstein did not appear to testify at the arbitration and take advantage of that accommodation. More significantly, the arbitrator noted in her final ruling that "there is no evidence in the record that there was ever during the course of the relationship any challenge or objection by Mr. Bergstein that the payments he had made were at any time not properly credited. Whereas there is evidence

there was objection to the amount of the billings and payment of statement was an ongoing issue, there is no evidence that [Bergstein] raised any issue that there was not a proper accounting for payments that were made."

Bergstein's apparent belief that he could not testify about uncredited payments without incriminating himself does not compel the conclusion that he should have been granted a blanket stay of the arbitration. " ' " 'There may be cases where the requirement that a criminal defendant participate in a civil action, at peril of being denied some portion of his worldly goods, violates concepts of elementary fairness in view of the defendant's position in an inter-related criminal prosecution. . . . The court, in its sound discretion, must assess and balance the nature and substantiality of the injustices claimed on either side.' " ' " (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1054, *quoting People v. Coleman* (1975) 13 Cal.3d 867, 885.) As discussed above, this is exactly what the arbitrator did. She balanced Bergstein's interest in protecting himself from revealing potentially incriminating information with MSK's interest in the prompt resolution of its claims. Unfortunately for Bergstein, in a civil case a party may be required either to waive the privilege or accept the civil consequences of silence if he or she does not exercise it. (*Oiye*, *supra*, at p. 1054)

Finally, Bergstein provides two examples of cases where a court chose to grant a stay of civil proceedings pending the resolution of a criminal matter.[2] First, Bergstein discusses a

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[2] Bergstein also discusses a federal case, *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, that sets out factors to be considered in determining whether a stay of discovery should be granted to protect a party's Fifth Amendment

federal court's decision to stay a federal civil action against him based on the claims in the same federal criminal indictment at issue here. In that case, however, the court determined the allegations in the criminal indictment "significantly" and "substantially" overlapped with those in the case before it. The court observed both the civil case and the criminal action "rest[ed] upon claims that defendants, including Bergstein, engaged in a scheme to fraudulently transfer funds" from an investment portfolio and that Bergstein misrepresented the financial health of another entity involved in the fraudulent scheme.

Clearly, the federal civil action against Bergstein was directly related to the conduct underlying the criminal proceedings. That is not the case here. None of the named entities in the criminal indictment had anything to do with the claims in arbitration, and there was no evidence that MSK provided services to Bergstein in connection with his involvement with Weston. Bergstein has failed to demonstrate there is any overlap between his acts of alleged investment, wire, and securities fraud and his failure to pay MSK's legal fees for services unconnected to conduct underlying the criminal indictment.

Bergstein also asserts a decision by the Fourth District Court of Appeal supports a stay. There, a group of federal

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rights. Although our Sixth District cited the *Keating* factors with approval in determining whether a corporation was entitled to a stay of civil proceedings or of discovery pending the disposition of a related criminal case, we are not bound by any authority to undergo a *Keating* analysis. (*Avant! Corp. v. Superior Court*, *supra*, 79 Cal.App.4th 876.) We therefore decline to do so.

undercover agents got into a bar fight with three of the bar's employees. (*Pacers, Inc. v. Superior Court*, *supra*, 162 Cal.App.3d at p. 687.) The agents sued the employees for assault and battery and the United States Attorney sought indictments against the employees for criminal assault and battery. (*Ibid.*) The federal grand jury refused to issue indictments, but the United States Attorney maintained an open file on the case. (*Ibid.*) At their depositions in the civil action, the employees asserted their Fifth Amendment privilege based on the threatened criminal proceeding and sought an order postponing their depositions until after the statute of limitations ran on the criminal prosecution. (*Id.* at p. 688.) The Court of Appeal granted a writ of mandate to impose a stay of the civil proceedings. (*Ibid.*)

Bergstein argues he is entitled to a stay because, in *Pacers*, the proceedings were stayed even though defendants had not been indicted but were merely facing the potential they might be criminally charged. Because he was criminally charged, Bergstein contends, *Pacers* supports a stay.

We are not persuaded. The government in *Pacer*s could have chosen to again pursue a criminal action against the employees based on the *exact same conduct* underlying the civil action. Here, as discussed above, Bergstein has not shown any overlap between his alleged investment advisor and security fraud and his failure to pay MSK's fees for unrelated legal matters.

To conclude, where as here, the civil and criminal actions did not substantially overlap, Bergstein did not have a right to a blanket stay of the arbitration proceedings pending resolution of his federal criminal case. He was not entitled to " 'decide for himself' " whether he was protected by the Fifth Amendment.

(*Warford v. Medeiros*, *supra*, 160 Cal.App.3d at p. 1045.) What he was entitled to, and what the court afforded him, was the right to invoke the privilege upon specific questions or specific requests for evidence. Only then could the arbitrator discharge her duty to decide " ' "in connection with each specific area that the questioning party seeks to explore" ' " whether any given request was valid. (*Ibid.*, italics omitted.)

D. Public Policy

Bergstein argues the arbitrator violated public policy by awarding fees incurred after MSK's alleged breaches of loyalty and fiduciary duty. Specifically, Bergstein argued at the arbitration that MSK represented two clients simultaneously in the same civil action and settled the action adverse to Bergstein and in favor of its other client.

As the arbitrator found, however, the settlement relieved Bergstein of four outstanding personal loan guaranties in excess of $100 million. Moreover, there was a fifth loan guaranty ultimately resolved in Bergstein's favor pursuant to a nonsuit motion in that civil action. The record reflects no proof that Bergstein was damaged as a result of the settlement. Assuming for the sake of argument that an ethical breach is the type of public policy violation that may be raised on appeal of an arbitral award, we find no support in the record for Bergstein's position.

DISPOSITION

The order and judgment are affirmed. Parties to bear their own costs on appeal.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.